No. 86-1773

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ROBERT G. CRONSON, Auditor General of the State of Illinois,

Petitioner,

vs.

WILLIAM M. MADDEN, Acting Director of the Administrative Office of the Illinois Courts,

Respondent.

On Petition For A Writ Of Certiorari To The Illinois Supreme Court

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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I.

INTRODUCTION

The crux of this certiorari petition is the undisputed fact that the Illinois Supreme Court caused its own agent, Madden, to launch and conduct before it a mandamus action against Petitioner Cronson in which that court had a substantial institutional interest and bias. There the court adjudicated public audit issues in its own favor and in accordance with its prior pronouncements during a long dispute with Petitioner, an Illinois constitutional officer.

Respondent side-steps and evades the single issue raised, namely, whether federal due process was violated by a faulty decision-making process preventing Petitioner from receiving a fair trial before a fair and impartial tribunal.

Instead Respondent Court argues (through its agent Madden) that in *Madden* only state issues were involved, and no federal issue is presented in the petition for certiorari. Respondent claims exemption from the Rule of *In re Murchison* on the ground that the case below comes from a state court, hence there would be an interference with its jurisdiction over *state* concerns and *state* issues if this Honorable Court were to review the case.[1]

Respondent's factual assertions and legal conclusions concerning the effect of the petition are demonstrably incorrect; moreover, its arguments of lack of standing and reliance upon the doctrine of comity and federalism conflict with decisions of this Court in closely analogous cases.

The *Madden* decision below has not as yet been implemented or enforced and nothing has transpired which would operate to moot the petition. Hence, the case is ripe for review and corrective action by this Honorable Court. This is required, not for the adjudication of any state issue, as argued by the Respondent Court below but to prevent the continuing infringement of Petitioner's due process rights under the Fourteenth Amendment to a fair trial before a disinterested adjudicator.

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[1] Similarly, the Respondent Justice Simon, in his Responsive brief in *Clark* (No. 86-1870) states the "Question Presented" therein as whether "the substantive issue in those proceedings turned entirely upon a construction of state constitutional law and implicated important state interests?" That brief likewise evades the only issues actually raised in the Petition, namely the Federal due process violations. It will be more fully answered in Petitioner's Reply brief shortly to be filed in *Clark* (Docket No. 86-1870).

II.

ARGUMENT

A. The Only Issues Involved In This Certiorari Petition Are Federal Issues.

Petitioner Cronson raised no state issue either in the case below or in this application for writ of certiorari. This is demonstrable from the record. In *Madden*, the only pleading which Cronson filed before the Illinois Supreme Court, addressed the jurisdiction of that court to hear its own case and sought dismissal on federal due process grounds. Similarly in the federal case (*Cronson v. Clark*), the subject of the companion petition for writ of certiorari (Docket No. 86-1870), all of the pleadings of Cronson were limited to seeking relief from the same due process flawed decision-making process of the Illinois court in *Madden*. They too had, as their objective, to prevent the Illinois Supreme Court from deciding its own case and sought dismissal thereof. In neither *Madden* nor *Clark*, did Cronson ever ask adjudication of any state law questions. He described such issues in his pleadings only as contextual matters to demonstrate the serious infraction of which the pleadings complained, that is, the deprivation of his due process rights to a fair trial before a fair and impartial court.

The Responsive brief of Respondent Madden,[2] repeatedly asserts that in the *Madden* below, Petitioner had conceded his obligation under Illinois law to conduct the type of limited audit demanded by the Supreme Court in its

[2] Neither the Illinois Supreme Court, nor any member thereof, has responded to the petition for the writ. The only Responsive brief is that of Mr. Madden whose status as the agent-employee of the court in instituting and conducting the suit below is at the center of the due process issues raised herein. His Responsive Brief is completely silent concerning that relationship.

mandamus action (Respond. Brief, pages 2, 3, 4, 7). While state law issues are irrelevant in this case which tests the Illinois Supreme Court's decisional process, it must be pointed out here that those assertions are untrue. To the contrary, Petitioner continuously asserted during the audit dispute that the limited and partial audit sought by the Illinois court in its own mandamus suit, excluding from audit the public funds of the court's own agencies, would violate the Illinois constitution and his duties as Illinois Auditor General.

Respondent has simply omitted to file with the Appendix "A" accompanying his Responsive brief the letter of Robert G. Cronson dated December 16, 1985 referred to therein as an attachment "Exhibit B". This letter throws an entirely different light upon the nature of the underlying controversy from that sought to be portrayed by Respondent. It confronts any possible insinuation that Cronson's opposition to the Madden mandamus action was not serious, in good faith or possessed of substantial merit, an insinuation apparently aimed at averting serious consideration of Petitioner's due process contentions.

B. The Rule Of *In Re Murchison* Applies With The Same Force To Proceedings In State Courts As To Those In The Federal Judiciary When A Litigant Is Denied The Due Process Right To A Fair And Impartial Adjudicator.

There is no more basic constitutional principle than that upon which Petitioner relies in this proceeding. The right to a fair and impartial adjudicator goes to the heart of the legal system. Thus, in the most recent case applying the *Murchison* Rule, i.e., *Gray v. Mississippi*, ____ U.S. ____, 95 L.Ed.2d 622, decided by this Honorable Court on May 18, 1987, No. 85-5454, the Court highlighted the importance of an impartial adjudicator as going to "the very integrity of the legal system." It described the constitutional right as *basic* saying:

> "We have recognized that some constitutional rights [are] so basic to a fair trial that their infraction can never be treated as harmless error. *Chapman v. California*, 386 U.S. 23. *The right to an impartial adjudicator, be it a judge or jury, is such a right.*" (emphasis added)

95 L.Ed.2d 622 at 639.

It is revealing that in neither of the two Responsive briefs has any Illinois Supreme Court spokesman ever mentioned, let alone discussed, *Murchison* or its progeny. Neither brief seeks to answer or respond to the charges (substantiated by the Special Concurring Opinion below) that the *Madden* case was that court's own lawsuit, initiated for it by its own agent and employee, Mr. Madden, and resolved by it in its own favor. (Special concurring opinion of Justice Simon). (Pet. App. A, pp. 11, 12).

Instead Respondent advances the novel contention that the *Murchison* due process doctrine does not apply to the state judiciary in a case involving substantive state issues. See "Question Presented", (Madden Br., p. (i)) and (Clark Br., p. (i)). Of course any such interpretation would literally mock the due process guarantee, limiting relief only to faulty decision-making practices in federal courts and exempting the state judiciary from its reach. *Murchison* and its progeny have, in fact, consistently dealt with due process infractions in whatever context they arise, including review of state court actions involving state issues and state concerns. *Cf. In re Murchison*, 349 U.S. 133 (1955); *Tumey v. Ohio*, 273 U.S. 510, 532 (1927); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Gibson v. Barryhill*, 411 U.S. 564 (1973).

Obviously the fact that this dispute originally arose over state issues does not preclude this Honorable Court from exercising its federal jurisdiction to test the adequacy of the decisional process below and to afford the due process relief sought in the instant petition.

C. Principles Of Comity And Federalism May Not Properly Be Used To Defeat Petitioner's Due Process Right To A Fair Trial Before A Fair Adjudicator.

In Respondent Madden's brief, it is argued that principles of comity and federalism are applicable and stand in the way of the certiorari relief sought, citing *Younger v. Harris*, 401 U.S. 37 and related cases. The *Madden* brief (page 9) contains the circuitous argument "that state courts are competent to handle federal constitutional issues particularly in light of the fact that such decisions are reviewable by this court". While it is beyond dispute that state courts can and do "handle" federal constitutional issues, the evidence here shows that the highest court in Illinois *mishandled* its opportunity to perform this function when Cronson tried to point out the constitutional infirmities of the *Madden* case. Thus, Respondents' briefs continue to ignore any proper consideration of the due process issue while at the same time urging this Honorable Court to deny the writ. The argument is indeed circular and illogical.

The contentions of Respondents therefore overlook the key exception to the *Younger v. Harris, supra*, abstention doctrine; namely, that when a litigant lacks any adequate remedy in the state system, the doctrine is inapplicable. *Cf. National Metal Crafters v. McNeil*, 784 F.2d 812 at 822 (7th Cir. 1986); *Middlesex County Ethics Commission v. Garden State Bar Association*, 457 U.S. 423, 73 L.Ed.2d 166 at 124 (1982). To sum up, Cronson tried his best to secure due process from the Illinois Supreme Court, suggesting alternate means of resolution by a disinterested tribunal. The Illinois Supreme Court's response was to summarily close the door to all such relief.

D. The Rule Of Necessity Should Not Be Invoked By Any Court Which Launches And Tries Its Own Case In Violation Of Federal Due Process And The *Murchison* Rule.

Respondent's brief in Argument 4 invokes the Rule of Necessity notwithstanding that the majority in *Madden* had expressly declined to do so. (See, Pet. for Writ, p. 9). Respondent's reliance on *United States v. Will*, 449 U.S. 200, 66 L.Ed.2d 392 (1980), is also misplaced. (Resp. Br., p. 13). The case in *Will* was not a self-initiated action brought by the trial court itself through its own agent as here. Moreover, Respondent's belated effort to utilize the Rule of Necessity while claiming no pecuniary interests in members of the Illinois Supreme Court, misreads and misapplies the teachings of *Aetna Life Insurance Company v. Lavoie*, ____ U.S. ____, 89 L.Ed.2d 823 (1986) as emphasized in the concurring opinion of Mr. Justice Brennan. (See, Pet. herein, pp. 22 and 23).

There is much reason to doubt that the Rule of Necessity could ever apply to a lawsuit arranged, brought and conducted by the court itself which then seeks to invoke the doctrine in extenuation. So far as is known to Petitioner, no decision of this Honorable Court has to date dealt with such an anomalous situation, a fact which in itself would strongly support the granting of the writ of certiorari requested.

Petitioner can only ask: Was it really *necessary* for the Illinois Supreme Court to launch and try its own case in *Madden* when other trial alternatives were available, to escape the due process violation?

We respectfully call this Court's attention to Argument E of Cronson's Petition for Certiorari, pp. 25 to 28, there pointing out that the due process infraction was clearly avoidable and showing that numerous trial alternatives were available to the Illinois Supreme Court had it stepped

aside; also, its attention is drawn to Petitioner's Reply Brief concurrently being filed in No. 86-1870, including Argument B thereof, which addresses the requirement of Sup. Ct. Rule 17 concerning grounds of issuance of the writ of certiorari in cases of extreme departure from "the accepted and usual course of judicial proceedings. . . ." The *Madden* case below is clearly such a "departure".

Finally, Respondent contends that there is a lack of standing in Cronson to bring his petition before this Court. The *Madden* case was brought by the Illinois Supreme Court not by Cronson. To deny him standing as a defendant would be to deny him the only effective opportunity to defend himself.

III.

CONCLUSION

For the reasons stated herein and in Cronson's petition for writ of certiorari, the writ should be granted so that the constitutionally flawed decisional process used in *Madden* may be corrected and that Petitioner may be afforded a fair trial before a fair and impartial court as is his Fourteenth Amendment right.

Respectfully submitted,

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APPENDIX A

(Letterhead Of)

STATE OF ILLINOIS
OFFICE OF THE AUDITOR GENERAL
509 SOUTH SIXTH STREET
SPRINGFIELD
62701

December 16, 1985

Roy O. Gulley, Director
Administrative Office of the Illinois Courts
Supreme Court Building
Springfield, Illinois 62706

Dear Director Gulley:

I have your letter of December 11, 1985, requesting a partial audit of public funds administered by the Supreme Court of Illinois.

While I commend your desire to render an accounting of your stewardship of the Court's funds, I regret that I cannot, constitutionally, accommodate your request for a partial audit delineated and conditioned as to scope by the Supreme Court, or for any audit other than that provided by Constitution and Statute.

However, I have been, am and will remain ready, willing and able to conduct an audit of the Supreme Court at such time as the Supreme Court provides access to the records relating to public funds, which records are necessary to the conduct of financial and compliance audits pursuant to the Illinois Constitution and the Illinois State Auditing Act adopted thereunder.

Sincerely,

/s/ ROBERT G. CRONSON
Auditor General